U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 11 2011

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be a health care service provider. It seeks to permanently employ the beneficiary in the United States as a management analyst. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1]

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is July 28, 2008, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

As set forth in the director's September 23, 2009 denial, the primary issue in this case is whether the offered position requires a member of the professions holding an advanced degree. The AAO will also consider whether the petitioner has established its continuing ability to pay the proffered wage.[2]

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

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[1] Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. There is no evidence in the record of proceeding that the beneficiary possesses exceptional ability in the sciences, arts or business. Accordingly, consideration of the petition will be limited to whether the beneficiary is eligible for classification as a member of the professions holding an advanced degree.

[2] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

[3] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

At the outset, it is useful to discuss the DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
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> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by Federal Circuit Courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[4] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> * * *
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

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[4]Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

> The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

In summary, it is the DOL's responsibility to certify the terms of the labor certification, but it is the responsibility of U.S. Citizenship and Immigration Services (USCIS) to determine if the petition and the alien beneficiary are eligible for the classification sought.

Turning to the instant case, the job offer portion of the labor certification submitted with a petition requesting classification of the beneficiary as an advanced degree professional "must demonstrate that the job requires a professional holding an advanced degree or the equivalent." 8 C.F.R. § 204.5(k)(4). If the offered position, as set forth on the labor certification, does not require an

individual with an advanced degree, the petition must be denied. This is separate and distinct from the requirement that the beneficiary be a member of the professions holding an advanced degree,[5] and that the beneficiary meets the requirements of the job offered as set forth in the labor certification.[6]

The regulation at 8 C.F.R. § 204.5(k)(2), defines "advanced degree" as follows:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The key to determining whether the offered position requires an advanced degree is found on the labor certification. *See* 8 C.F.R. § 204.5(k)(4). The required education, training, experience and skills for the offered position are set forth at Part H of the labor certification. In the instant case, the labor certification states that the position has the following minimum requirements:

H.4. Education: Bachelor's degree in communications.
H.5. Training: None required.
H.6. Experience in the job offered: None required.
H.7. Alternate field of study: Business.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: 60 months experience as a Business Unit Manager, Marketing Manager or Marketing Assistant required.
H.14. Specific skills or other requirements: **Will accept educational equivalency evaluation prepared by qualified evaluation service or in accordance with 8 CFR 214.2(h)(4)(iii)(D).** Will accept any suitable combination of education, training or experience.

(Emphasis added). This regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D) states:

> (D) Equivalence to completion of a college degree. For purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to

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[5] 8 C.F.R. § 204.5(k)(3).

[6] 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

(*1*) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

(*2*) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(*3*) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(*4*) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(*5*) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty. If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

> (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
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> (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
>
> (v) Achievements which a recognized authority has determined to be significant contributions to the field of t he specialty occupation.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D) permits a combination of lesser education and/or experience to be equivalent to a U.S. bachelor's degree. Therefore, by stating at Part H.14 of the labor certification that the petitioner will accept an educational equivalency evaluation prepared in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D), the labor certification states that an individual with less than a U.S. bachelor's degree or foreign equivalent degree could qualify for the offered position.

Since the instant labor certification permits an individual to qualify for the offered position with a combination of education, training and/or work experience evaluated as equivalent to a U.S. bachelor's degree, the requirements of the job offered can be met with less than a U.S. master's degree (or foreign equivalent) or a U.S. bachelor's degree (or foreign equivalent) followed by at least five years of progressive experience in the specialty. Therefore, the labor certification does not require an individual with an advanced degree as defined by 8 C.F.R. § 204.5(k)(2).

On appeal, counsel, citing *Madany* v. *Smith,* 696 F.2d 1008, argues that the director failed to consider the labor certification as a whole. Counsel states that Part H.8 of the labor certification asks whether the petitioner would accept an alternate combination of education and experience, and that the petitioner responded "no" to this question. Counsel argues that, had the petitioner intended to accept less than a full bachelor's degree, it would have answered "yes" instead. Counsel also notes that, at Part J.19, which asks "Does the alien possess the alternate combination of education and experience as indicated in question H.8?", the employer stated "NA", because the employer stated at Part H.8 that it would not accept a combination of education and experience. Citing *Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401 (Comm. 1986), counsel argues that the director may not ignore a term in the labor certification not may it impose additional requirements.

Counsel also submits an AAO decision that concluded that a statement on the labor certification that the petitioner would accept a "degree equivalency based on foreign sources" would not be interpreted to mean that the employer will accept less than a bachelor's degree in light of the requirements stated at Part H.4, 6 and 8 of the labor certification and a letter from the petitioner stating its intent regarding the minimum requirements of the offered position. The AAO decision submitted by counsel has not been designated as a precedent decision. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). While 8 C.F.R. § 103.3(c) provides that USCIS precedent decisions are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. It is also noted that the

facts of the submitted AAO decision differ from those in the instant case, notably in the different wording of the statement at H.14 of the labor certification.

Counsel also submits a Nebraska Service Center liaison report prepared by the American Immigration Lawyers Association (AILA) dated August 31, 2003. In the report, a USCIS official is quoted as stating that a single foreign degree is accepted as equivalent to a U.S. bachelor's degree. This point is not in dispute and is not relevant to the grounds of the director's decision.[7]

Counsel also states that 8 C.F.R. § 214.2(h)(4)(iii)(D)*(3)*("An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials") was the only provision of the regulation that the petitioner intended to apply to the labor certification, and that "[i]f there was confusion at USCIS about which part of the regulation was intended to apply, the Nebraska Service Center should have sent a Request for Evidence." This argument is not persuasive. If the petitioner erred in citing 8 C.F.R. § 214.2(h)(4)(iii)(D) instead of 8 C.F.R. § 214.2(h)(4)(iii)(D)*(3)*, counsel should not blame USCIS for failing to catch the petitioner's mistake. There was no confusion by USCIS as to what part of the regulation to apply.

Finally, counsel submits a letter from [redacted]. The letter states:

> This letter is to confirm that the minimum requirements of the Management Analyst position are a U.S. Bachelor's degree or foreign degree plus five years progressive experience. With respect to a foreign equivalent degree we will accept a single degree that has been evaluated by a reputable credentials evaluation service to be a foreign equivalent degree. We will not accept any other arrangement, such as a combination of course work and work experience, in lieu of an actual U.S. Bachelor's degree or single foreign equivalent degree itself.

[redacted] statement of the petitioner's intent does not change the analysis. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. at 406. *See also, Madany* v. *Smith,* 696 F.2d 1008; *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coorney,* 661 F.2d 1 (1st Cir. 1981). The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer exactly as it is completed by the prospective employer." *Rosedale*

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[7] In addition, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Askkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd,* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

Linden Park Company v. Smith, 595 F. Supp. 829, 833 (D.D.C. 1984). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve "reading and applying the plain language of the [labor certification]." *Id.* at 834.

Even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at *7.

The requirements of the offered position as set forth on the labor certification are not ambiguous. On Part H.14 the labor certification, the petitioner states that it would accept an educational equivalency evaluation in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D). It is well established that this regulation permits an equivalency to a bachelor's degree based on a combination of experience and/or education. Although counsel notes that this statement appears to conflict with the answer to Part H.8 and J.19 of the labor certification, the statement itself is not ambiguous.[8]

USCIS cannot change or modify the labor certification. Even if counsel submits evidence demonstrating that the labor certification states something different than the petitioner intended it to say, the USCIS is bound by the plain language of the labor certification. When the terms of a labor certification are ambiguous, USCIS may consult additional evidence of the petitioner's intent to determine the meaning of that term. However, there is no ambiguity here. Further, it is noted that an uncorroborated statement of intent by an officer of the petitioner that is issued after the denial of the petition is of limited reliability.

The AAO concurs with the director's decision and the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established its continuing ability to pay the proffered wage. Accordingly, the appeal could not be sustained for this additional reason. The petitioner must establish that its job offer to the beneficiary is a realistic one. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the

[8] It is also noted that one can theoretically be evaluated to have earned the "equivalent" of a bachelor's degree pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D) through experience or training alone. Accordingly, one could meet the requirements of the labor certification without having earned a bachelor's degree and without an evaluator needing to "combine" education and experience.

> priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Therefore, the petitioner must establish that it has possessed the continuing ability to pay the proffered wage beginning on the July 28, 2008 priority date.

The record contains a copy of the petitioner's 2007 federal tax return and an IRS Form 7004, Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns. As is stated above, the petitioner must establish its ability to pay the proffered wage "at the time the priority date is established" and evidence "*shall* be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.* (Emphasis added.). Accordingly, in order to establish its ability to pay the proffered wage, the petitioner must submit a 2008 annual report, federal tax return, or audited financial statement. The petitioner's 2007 tax return can be used to establish ability to pay in 2007, but not 2008. The submission of a Form 7004 does not excuse this requirement. The petitioner cannot avoid submitting required evidence by filing a Form 7004 with the IRS. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043; *see also Soltane v. DOJ*, 381 F.3d at 145.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States,* 229 F. Supp. 2d at 1043.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.